STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee

v

DAVID ROSS AMES **No. 156077**
Defendant-Appellant.

L.C. 16-017887-FH
COA No. 337848

REPLY BY AMICUS CURIAE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL TO AMICUS CURIAE SUPPORTING THE APPLICATION FOR LEAVE TO APPEAL FILED BY THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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Table of Contents

Index of Authorities

Counterstatement of the Question

I.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible due process claims, such as the consideration of constitutionally impermissible factors in setting the sentence. Because the sentence here was within properly scored guidelines, must it be affirmed?

Amicus answers YES

Statement of Facts

Amicus concurs in the facts as stated by the People of the State of Michigan.

Argument

I.

The legislature through MCL 769.34(10) has divested appellate courts of authority to review sentences within properly scored guidelines. There is no basis on which the statute can be said to be unconstitutional, so long as understood to allow possible due process claims, such as the consideration of constitutionally impermissible factors in setting the sentence. The sentence here was within properly scored guidelines, and thus must be affirmed.

A. "Section 34(10) is incompatible with the advisory sentencing guidelines scheme this Court adopted in *Lockridge*"[1]

CDAM asserts that this Court "adopted an advisory sentencing guidelines scheme." But it did not, nor does it have the authority to do so. The Court did not "adopt an advisory sentencing scheme," for that would be the work of a legislature, which in fact had promulgated a comprehensive sentencing scheme; rather, it struck portions of that legislative scheme. Having found that the enhancement of a guidelines range by scoring of OVs (Offense Variables) calculated by way of judicial fact-finding violates the Sixth Amendment when, and only when, sentencing within that range is mandatory, at least in the sense that a departure from the range requires the articulation of substantial and compelling reasons for doing so which are objective and verifiable, and keenly grab the attention, the Court was required to remedy the violation. It did so by severing that which made the guidelines mandatory:

> we sever MCL 769.34(2) to the extent that it is mandatory and strike down the requirement of a "substantial and compelling reason" to depart from the guidelines range in MCL 769.34(3). When a defendant's sentence is calculated using a guidelines minimum

[1] CDAM Brief, p. 4.

> sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so.[2]

Though the Court said that the mandatory nature of the guidelines was severed when "a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury," in the *Steanhouse* decision the Court later said that this apparent limitation on the severance remedy to those situations where required to remedy a constitutional injury was no limitation at all,[3] for "*Lockridge*'s remedial holding render[ed] the guidelines advisory in all applications."[4]

But having severed MCL 769.34(2) and (3)—even where their application is not unconstitutional[5]—the Court did not rest. It went further, and substituted a standard of review for out-of-guidelines sentences for the one the legislature had established: "A sentence that departs from

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[2] *People v. Lockridge*, 498 Mich. 358, 391–392 (2015).

[3] See also the apparent words of limitation in the Remedy section of *Lockridge* that "When a defendant's sentence is calculated using a guidelines minimum sentence range in which OVs have been scored on the basis of facts not admitted by the defendant or found beyond a reasonable doubt by the jury, the sentencing court may exercise its discretion to depart from that guidelines range without articulating substantial and compelling reasons for doing so." Id.

[4] *People v. Steanhouse*, 500 Mich. 453, 466 (2017).

[5] "[W]e reject the operability of a guidelines scheme in which trial courts are statutorily directed to score the 'highest number of points' possible but are constitutionally constrained from treating the guidelines as mandatory only if facts relied on to justify the scoring of the guidelines are found by a judge rather than by a jury or admitted by a defendant. See MCL 8.5 (providing that the remaining constitutional applications of the statute are to be given effect unless determined to be 'inoperable')." Id., at 467–68.

the applicable guidelines range will be reviewed by an appellate court for reasonableness."[6] And in *Steanhouse* the Court gave more content to review for reasonableness, saying that an appellate court is to engage "in reasonableness review for an abuse of discretion informed by the 'principle of proportionality' standard."[7] And proportionality itself is not to be "impermissibly measur[ed] . . . by reference to deviations from the guidelines"; rather, "'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.'"[8]

The Court, then, remedied the Sixth Amendment violation it found by severing the mandatory nature of the guidelines, but also added to the statute, rather than leaving to the legislature what, if anything, it wished to do with review of out-of-guidelines sentences, by substituting the reasonableness standard described above for the substantial-and-compelling standard. Federally, in *Booker*, when the Court there found that the mandatory application of the federal guidelines worked a Sixth Amendment violation, the Court applied reasonableness as the standard of review because it found that standard *within the statute*, albeit implicitly so: "[A] statute that does not explicitly set forth a standard of review may nonetheless do so implicitly. . . . We infer appropriate review standards from related statutory language, the structure of the statute, and the ' 'sound administration of justice.' . . . And in this instance those factors, in addition to the past two decades of appellate practice in cases involving departures, imply a practical standard of review already familiar to

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[6] *Lockridge*, at 392.

[7] *Steanhouse*, at 476.

[8] Id., at 474-475. Unfortunately, the Court of Appeals is routinely assessing the proportionality of out-of-guidelines sentences by measuring them with reference to deviations from the guidelines. See infra.

appellate courts: review for 'unreasonable[ness].' . . . the text [of the prior statute] told appellate courts to determine whether the sentence 'is unreasonable' with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable. . . . we read the statute as implying this appellate review standard."[9] But that standard cannot be found implicit within the Michigan statutory scheme, and, most importantly for purposes here, cannot be found with regard to in-guidelines sentences where the legislature has specifically *precluded* appellate review.

An in-guidelines sentence *cannot* be unreasonable because the legislature has provided that no standard of review of an in-guidelines sentence exists. An in-guidelines sentence can be unreasonable in the federal system because that standard of review has not been precluded by the legislature, but instead has been found implicit within the statutory scheme. Not so in Michigan. Unless preclusion of review of an in-guidelines sentence for reasonableness violates the Constitution, the statute must stand. This Court did not in *Lockridge* nor *Steanhouse*, alone or together, promulgate a sentencing scheme. That is for the legislature, and if it wishes to modify the preclusion of appellate review for a guidelines sentence—assuming the guidelines were properly scored, and no impermissible factors were considered in sentencing—that is for the legislature to decide. It has not done so. And so long as sentencing judges are not compelled to sentence within the guidelines, there can be no constitutional violation.

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[9] *United States v. Booker*, 543 U.S. 220, 260–61, 125 S. Ct. 738, 765–66, 160 L. Ed. 2d 621 (2005).

B. "Enforcing § 34(10) would make the guidelines mandatary in some appeals but not others, contrary to the Legislative preference to treat all cases equally"[10]

CDAM's premise does not follow from the statutory scheme; the legislative scheme has never treated "all cases equally," as the legislative scheme under § 34(10) requires the affirmance of a guideline sentence (assuming properly scored guidelines, and no consideration of impermissible factors), while out-of-guidelines sentences were reviewed for substantial and compelling reasons for the departure. The two were thus never treated the same. CDAM wrenches this Court's reference in *Lockridge* to the "Legislature's expressed preference for equal treatment" out of context. This Court there was referring to the legislative intent that "the applicable guidelines minimum sentence range . . . be mandatory in all cases (other than those in which a departure was appropriate) at both the top and bottom ends," and so "[o]pening up only one end of the guidelines range, even if curing the constitutional violation, would be inconsistent with the Legislature's expressed preference for equal treatment. . . . it would require a significant rewrite of the statutory language to maintain the mandatory nature of the guidelines ceiling but render the guidelines floor advisory only." This Court thus declined "to limit the remedy for the constitutional infirmity to the floor of the guidelines range."[11] But this has nothing to do with treating in-guidelines and out-of-guidelines sentences differently for appellate review, which the legislative scheme as written does. Maintaining that distinction is consistent with the statutory scheme as enacted, and again, unless § 34(10) is unconstitutional, it must stand.

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[10] CDAM Brief, p. 9.

[11] *Lockridge*, at 390.

C. Conclusion

CDAM expresses a concern that mandatory affirmance of in-guidelines sentences will in some sense render guidelines sentences "mandatory." But it is to be expected that most sentences will fall within the guidelines, and so long as a judge is not required to so sentence, the constitution is satisfied. But there *is* a concern with "creeping mandatoriness," and that is the Court of Appeals current failure to review out-of-guidelines sentences in accordance with this Court's directive in *Steanhouse*. This Court said there said that review of out-of-guidelines sentences for reasonableness informed by the principle of proportionality poses no constitutional problem because in Michigan proportionality is not to be "impermissibly measur[ed] . . . by reference to deviations from the guidelines"; rather, "'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.'" But the Court of Appeals is doing precisely that which this Court prohibited, as the test it is applying is that "when departing, the trial court must explain why the sentence imposed is *more proportionate than a sentence within the guidelines recommendation* would have been."[12] That court is plainly measuring departures "by reference to deviations from the guidelines," with a presumption *against* a departure sentence.

This Court should not further rewrite the legislative scheme, but instead leave revisions to the legislature. Amicus submits that the legislative scheme was a rational scheme, that better aided in cabining sentence disparity than the system now in place; the game must be worth the candle.[13]

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[12] *People v. Dixon-Bey*, __Mich. App__, No. 331499, 2017 WL. 4272135 (2017); *People v. Steanhouse (On Remand)*, __Mich. App__, No. 318329, 2017 WL 6028509 (2017).

[13] If a constitutional violation there be, then it must be remedied, but in the absence of a violation shown beyond a reasonable doubt, see *Ogden v. Saunders*, 25 U.S. 213, 270, 6 L. Ed.

Because, for the reasons stated by Chief Justice Markman in dissent in *Lockridge*, that legislative scheme did not contravene on the Sixth Amendment rights of defendants, it would be better for all concerned if it were returned to.

606, 12 Wheat. 213 (1827), this displacement of the workable and salutary statutory scheme is not appropriate.

Relief

Wherefore, amicus requests that this Court deny defendant's application for leave to appeal (or grant leave and reconsider Lockridge).

Respectfully submitted,

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